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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 18 1996

In the Matter of)

Implementation of Sections 202(f),
202(i) and 308(i) of the
Telecommunications Act of 1996)

CS Docket 96-56

Cable Television Antitrafficking,
Network Television and MMDS/SMATV
Cross-Ownership Rules)

**REPLY OF THE NETWORK AFFILIATED STATIONS ALLIANCE
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

The Network Affiliated Stations Alliance ("NASA"), a coalition of the affiliate organizations of the ABC, CBS and NBC television networks representing more than 600 television stations, hereby replies to the oppositions to the above-captioned petition for rulemaking (the "Petition") filed by CBS, Inc. ("CBS"), Capital Cities/ABC, Inc., a wholly owned subsidiary of the Walt Disney Company ("ABC"), the National Broadcasting Company, Inc. ("NBC"), the National Cable Television Association ("NCTA") and Turner Broadcasting System, Inc. ("Turner").

Although the oppositions are remarkably dismissive of any concern for media diversity in the United States in general or in the television market in particular, they are most noteworthy for what they do not say. The oppositions do not cite a single case for the proposition that the Administrative Procedure Act (the "APA") permits an administrative agency to make a statutorily required finding that a rule -- here, safeguards intended to protect interests expressly enumerated by Congress -- is not "necessary" without compiling a whit of record evidence or seeking a word of public comment.

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Indeed, CBS even concedes that the Commission now, at this late juncture, may be "required to give some explanation' if it does not grant the NASA Petition's request for a rulemaking proceeding "^{1/}

The plain fact is that the Commission, in its haste to demonstrate progress in implementing the Telecommunications Act of 1996, simply ignored the dictates of the APA and committed error that must be corrected either by the Commission or by the Court of Appeals.^{2/} We urge the Commission to correct its error now and commence a valid notice-and-comment rulemaking proceeding to determine, as Congress explicitly demanded, whether safeguards are, in fact, "necessary" to protect the interests explicitly enumerated by the Act before eliminating the broadcast network-cable television cross-ownership rule.

I. THE COMMISSION'S DECISION THAT SAFEGUARDS ARE NOT "NECESSARY" IS INVALID UNDER THE APA BECAUSE IT WAS UNDERTAKEN WITHOUT PUBLIC COMMENT.

Section 202(f) of the Telecommunications Act of 1996 provides that the Commission "shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system."

^{1/} See CBS Opposition at 5, citing WWHT v. Federal Communications Comm'n, 656 F.2d 807, 819 (D.C. Cir. 1981). The time for such an "explanation," of course, is not now but at the point when the Commission made its decision; it is simply inarguable that such an "explanation" must be based on a record compiled after public comment.

^{2/} We understand, of course, the inordinate demands that have been placed upon the Commission's resources by the rulemaking proceedings required to implement the Telecommunications Act of 1996. But it should be noted that Section 202(f) of that Act, which is at issue here, contained no statutory deadline with which the Commission had to race to comply.

The very next subsection provides that the Commission "shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations" by a cable-network combination.

NASA has never, contrary to suggestions by NBC and others, asserted that the Commission should have defied Congress and kept the cable/broadcast network cross-ownership rule on the books. Repealing the rule without soliciting any public comment concerning whether safeguards were necessary, however, was not mandated. To the contrary, the Commission was obligated by statute to determine if it was necessary to revise its regulations protecting nonaffiliated broadcasters. The Commission opted to make that determination unilaterally and without public input.^{3/}

The Commission decided, without any notice and comment proceeding -- indeed, without any proceeding at all -- that it was not necessary to establish the regulatory safeguards described in Section 202(f)(2). The APA, however, requires that the public be afforded notice and an opportunity to participate in rulemaking proceedings except under two defined circumstances. See 5 U.S.C. § 553. Rulemaking procedures are not necessary when the administrative agency (1) seeks merely to issue interpretive rules, general statements of policy or rules concerning the agency; or (2) finds, for good

^{3/} Also contrary to the assertions of the oppositions, Congress is under no obligation whatsoever to state in each subsection of the Telecommunications Act of 1996 that it desires a rulemaking proceeding. It should be clear that Congress' directive to revise such regulations if necessary requires a finding that safeguards either are or are not necessary. A "finding," of course, can only be based on record evidence, not speculation and surmise.

cause (and states the findings and reasons relied upon) that notice and public procedures are impracticable, unnecessary or contrary to the public interest. Id.

A decision that safeguards are not necessary is not interpretive. In the Commission's own words it will monitor future events "to determine whether additional rule changes are necessary."^{4/} The "necessary" determination is a decision whether to promulgate additional rules -- a decision the Commission is mandated to make under Section 202(f). That decision has a substantive impact on the rights, duties and obligations of all parties affected by the cable/broadcast network cross-ownership rule and its subsequent repeal.

Moreover, no reasoned analysis or findings accompanied the Commission's decision that safeguards are not necessary. An agency's decision is rendered arbitrary and capricious by failure of the agency to cogently explain why it has exercised its discretion in a given manner. International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983). The Commission explained why it lifted the cable/broadcast network cross-ownership ban. That explanation is clear -- the Commission was obligated to do so under the law. The Commission, however, was silent as to the reason why it decided that safeguards are not necessary. Such a decision, unaccompanied by reasoned explanation, cannot stand. The Commission should have determined if safeguards are

^{4/} Implementation of Section 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996: Cable Television Antitrafficking, Network Television, and MMDS/SMATV Cross-Ownership Rules, Order, CS Docket No. 96-56 (released March 18, 1996) at ¶4, n.3 (emphasis added)

necessary through a rulemaking proceeding.^{5/} By subverting the APA, the Commission has denied the public the opportunity to participate in the determination of whether safeguards are necessary. The Commission has effectively given potential cable/broadcast network combinations carte blanche to ride roughshod over local broadcast stations to the detriment of diversity of programming in local markets. In the event that the Commission ultimately decides that safeguards are necessary, in response to certain practices of cable/broadcast network combinations, the Commission will be in the hapless position of attempting to put the cat back into the bag.

II. THE COMMISSION'S DECISION TO "STAY ITS HAND" WAS AN AFFIRMATIVE ACTION THAT WILL HAVE FAR REACHING CONSEQUENCES FOR THE PUBLIC AND LOCAL BROADCASTERS

Free television will be adversely affected if appropriate safeguards are not adopted. Local broadcasters have an obligation to advise the Commission of the consequences that accompany the Commission's failure to adopt safeguards.^{6/} Diversity

^{5/} NCTA erroneously asserts that "[t]he Commission can only determine whether additional safeguards are necessary after it monitors the response to the initial rule change." NCTA Opposition at 4. The Commission has in the past, on many occasions, initiated rulemaking proceedings to determine what rule changes are necessary. The Commission is, in fact, obligated to do so under most circumstances. In this case, the Commission made no determination that notice and public comment procedures were impracticable, unnecessary, or contrary to the public interest as to the regulatory safeguards. Rather such a finding was made as to the rule changes that conformed the Commission's rules to the statute. However, as noted above, these two changes are not synonymous.

^{6/} CBS is correct in arguing that the Commission should not assess the need for any new regulation based on conjecture. See CBS Opposition at 7-8. It is for precisely that reason that a notice and comment proceeding should be initiated. With such a proceeding, the Commission may be apprised of the need, if any, for safeguards.

of television programming should be a concern of the Commission, not only a concern of the broadcast industry. Neither Congress nor the APA conferred upon the Commission the power to cavalierly disregard proper procedures for determining whether safeguards are necessary.

NASA did not argue that the Commission's failure to adopt safeguards was wrong, although we believe that it was the wrong decision and it most likely will have a dramatically negative effect on diversity in television.^{7/} Rather, NASA asserted and continues to assert that the Commission should have, at the very least, made a carefully reasoned decision after notice-and-comment rulemaking regarding the necessity of safeguards. In its petition, NBC argues that "NASA offered no substantive evidence of potential harm." NBC Opposition at 2. We would embrace an opportunity to provide substantive evidence of the potential harm of not implementing safeguards. Unfortunately, by summarily dismissing any rulemaking proceeding, the Commission precluded us from doing so.

The Commission had an obligation to notify the public and to review comments on the necessity of safeguards.^{8/} Adopting a "wait-and-see" approach was expedient but inadequate. If Congress was truly unconcerned with safeguards to protect

^{7/} Our submission of proposed safeguards was meant to be illustrative of those we would submit during a rulemaking.

^{8/} To base this new decision that safeguards are unnecessary on past rulemaking proceedings, as ABC suggests, is improper. Although past proceedings are relevant, we are aware of no provision of the APA that allows new rulemaking decisions to be based on pleadings filed years ago in a different proceeding. Further, the stale record for a three-year old docket can hardly be considered sufficiently recent to form the basis for a decision here.

the public, it would never have passed Section 202(f)(2). Instead, "safeguards against discrimination" is a separate subsection aside and apart from elimination of the cable/broadcast network cross-ownership rule.

Finally, events since the Commission took this action demonstrate that NASA was rightly concerned that safeguards be in place before, rather than after, network-cable mergers. Although no network has yet merged with a large cable multiple system owner ("MSO"), the Fox television network apparently has discussed granting a substantial equity stake to Tele-Communications, Inc., the nation's largest MSO, in exchange for its agreement to carry a Fox news channel on its cable television systems. Clearly, the Commission must act now properly to consider whether safeguards for the industry as a whole are "necessary" before it is faced with a specific transaction in which it will be required to consider safeguarding the public interest. Turner's suggestion that the Commission has merely deferred action on safeguards is tantamount to admitting that the Commission's has denied action.^{9/} Unfortunately, for practical purposes, late safeguards mean no safeguards. The Commission, by denying any reasoned determination regarding safeguards, has left itself ill-equipped to handle public concerns once a cable/broadcast network merger has been proposed. Case-by-case rulemaking is inefficient and unfair.^{10/}

^{9/} See Turner Opposition at 1.

^{10/} The APA is designed, in large part, to avoid this type of selective rulemaking and resulting arbitrariness.

CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition, the Commission should grant NASA's Petition and initiate a rulemaking proceeding to determine if regulatory safeguards are necessary to protect the public and broadcast stations in this new era of cable/broadcast network conglomerations.

Respectfully submitted,

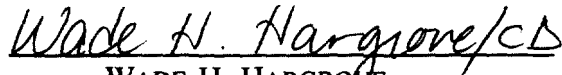
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July 18, 1996

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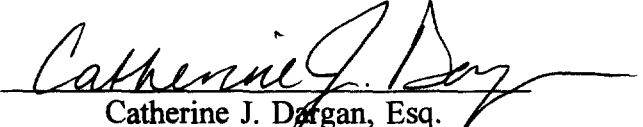
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